

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 99

Docket No. PH-0831-10-0626-I-1¹

**Donald J. Magelitz,
Appellant,
v.
Office of Personnel Management,
Agency.**

August 21, 2012

Donald J. Magelitz, Fort Ashby, West Virginia, pro se.

Lesley Gordon and Roxann Johnson, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 Counsel for Elaine Deursch, the appellant's daughter, filed a petition for review and motion to reopen, purportedly on behalf of the appellant, challenging the administrative judge's decision ordering the Office of Personnel Management

¹ This matter was originally docketed as a petition for review of the compliance initial decision in MSPB Docket No. PH-0831-10-0626-C-1. Upon further briefing by the parties and Elaine Deursch, it is clear there are no challenges to the initial decision in the compliance proceeding. The petition for review solely concerns the matters at issue in MSPB Docket No. PH-0831-10-0626-I-1, and it has been redocketed accordingly. The compliance initial decision in MSPB Docket No. PH-0831-10-0626-C-1 is the final decision of the Board in that matter.

(OPM) to provide the appellant with the opportunity to make an election of a former spouse survivor annuity for his ex-wife, Dorothy Magelitz. For the following reasons, we DISMISS the petition for review and DENY the request to reopen.

BACKGROUND

¶2 The appellant, Donald Magelitz, chose a reduced annuity with survivor benefits for his wife, Dorothy Magelitz, upon his retirement in 1985. MSPB Docket No. PH-0831-10-0626-I-1, Initial Appeal File (IAF), Tab 5, Subtab 5 at 29-30. The appellant and Ms. Magelitz divorced in 2004. *Id.* at 3, 17-18. In February 2009, the appellant discovered a payment in the amount of \$19,628 from the United States Treasury and learned that it was an adjustment of annuity benefits retroactive to 2004, the date of his divorce. *Id.* at 26. He contacted OPM and learned that his election of a reduced annuity in order to provide a survivor annuity to Ms. Magelitz became void upon their divorce because the divorce decree was not a valid election of a former spouse survivor annuity. *Id.* at 23. OPM acknowledged that it should have eliminated the survivor benefit in 2004, upon their divorce, but failed to make the adjustment until 2009 when it paid him a lump sum of accrued annuity. *Id.* The appellant and Ms. Magelitz then obtained and submitted an Addendum to the final order of divorce, dated May 20, 2009, for the purpose of providing Ms. Magelitz with a former spouse survivor annuity. *Id.* at 1-2. In its initial and reconsideration decisions, OPM determined that the Addendum was not a qualifying court order and that the appellant did not make an election of a former spouse survivor annuity within the requisite 2 years after the divorce. IAF, Tab 5, Subtabs 2, 4. The appellant, appearing pro se, filed an appeal of OPM's reconsideration decision finding him ineligible to elect an annuity with survivor benefits for his former spouse. IAF, Tab 1 at 5, 7.

¶3 The administrative judge reversed OPM's reconsideration decision, finding that OPM failed to establish through credible evidence that it sent the required notice to the appellant in 2004 and 2005 informing him of the requirement to make a new election of survivor annuity benefits for a former spouse. IAF, Tab 17, Initial Decision (ID) at 7. The administrative judge further found that OPM provided incorrect information to him about the effect of the divorce and that the appellant clearly intended to provide survivor annuity benefits for Ms. Magelitz. ID at 8. Accordingly, the administrative judge ordered OPM to afford the appellant the opportunity to make an election of survivor annuity benefits for his former spouse. ID at 9-10.

¶4 The January 4, 2011 initial decision became final on February 8, 2011, because neither party filed a timely petition for review. ID at 10; *see* [5 C.F.R. § 1201.113](#). On March 2, 2011, the appellant filed a petition for enforcement alleging that OPM had not complied with the decision. MSPB Docket No. PH-0831-0626-C-1, Petition for Enforcement (PFE) File, Tab 1. On March 22, 2011, he designated his ex-wife, Ms. Magelitz, as his representative.² PFE File, Tab 5. On May 19, 2011, OPM provided Mr. Magelitz with information and a form to complete regarding his opportunity to make an election of a former spouse survivor annuity for Ms. Magelitz. PFE File, Tab 10. On May 26, 2011, the administrative judge, with Ms. Magelitz's consent, dismissed the petition for enforcement as moot. PFE File, Tab 13.

² While the Board's regulations allow parties wide discretion in choosing their representatives, a designee may be challenged by the other party or parties, and disqualified by the administrative judge, on the grounds that the representation involves a conflict of interest or position. *See LaGreca v. U.S. Postal Service*, [114 M.S.P.R. 162](#), ¶ 10 (2010); [5 C.F.R. § 1201.31\(b\), \(c\)](#). In the compliance proceeding, it does not appear that the appellant's designation of his former spouse as his representative was challenged, even though the latter's interests in pursuing the election of a survivor annuity benefit may arguably conflict with those of the appellant. In order to avoid any actual or appearance of a conflict of interest in this matter, we believe that the proper role for Ms. Magelitz in any future adjudication in this case should be as an intervenor.

¶5 On June 21, 2011, the Board received a “Request and Petition for Reconsideration and Nullification of Election of Retroactive Survivor Annuity Benefits” from an attorney purportedly acting on behalf of Elaine Deursch, the appellant’s daughter and “attorney-in-fact.” Petition for Review (PFR) File, Tab 1 at 1. In it, Ms. Deursch challenged the validity of the former spouse survivor election form “purportedly executed” by the appellant on May 24, 2011. PFR File, Tab 1 at 1; *see* PFR File, Tab 5, Exhibit D. Ms. Deursch alleged that the appellant “was suffering from dementia and myriad other psychological and physical problems and was not legally competent to execute the document.” PFR File, Tab 1 at 2. She also stated that the appellant’s actions were a result of coercion and his own incompetence. *Id.* She attached a statement from Mountain View Primary Care regarding the appellant’s treatment for dementia since August 2009 and a notarized durable power of attorney form, dated June 2, 2008, naming Ms. Deursch as the appellant’s agent. *Id.* at 2-8. Ms. Magelitz, through counsel, filed a response asking the Board to affirm the initial decision, arguing that the appellant has consistently expressed his intent to provide her with a former spouse survivor annuity and that there have not been any questions as to his competence. PFR File, Tab 5 at 1-4. She further asserted that Ms. Deursch was aware of the appellant’s intent to provide her with a former spouse survivor annuity. *Id.* at 5.

¶6 OPM responded, stating that, in light of Ms. Deursch’s submission, there were questions regarding whether the appellant was competent to act on his own behalf. PFR File, Tab 6 at 4. OPM requested that the Board reopen the appellant’s initial appeal, vacate the initial decision, and remand for factfinding to determine whether the appellant was capable of representing himself and whether the former spouse survivor annuity election he made on May 24, 2011,

was invalid.³ *Id.* at 4, 6-9. Ms. Magelitz filed another submission asserting that, although the appellant was diagnosed with a mild form of dementia, he was lucid and competent to manage his own affairs. PFR File, Tab 10 at 1. She further argued that his election of the former spouse survivor annuity was fully consistent with his expressed intent and actions since his retirement. PFR File, Tab 10 at 2-3. She also submitted that Ms. Deursch became concerned and contacted OPM only after she discovered the “amount of money involved” even though Ms. Deursch had acknowledged that Ms. Magelitz was entitled to the survivor benefits. PFR File, Tab 12 at 1.

¶7 The submissions filed on petition for review raised several questions that could not be resolved on the existing record. First, Ms. Deursch and her attorney did not submit a properly executed designation of representative, despite notice from the Clerk of the Board of the deficiency of the petition for review. PFR File, Tabs 1-3. Thus, the petition for review was deficient under the Board’s regulations. Furthermore, the June 16, 2011 petition for review was submitted and docketed as a petition for review of the compliance initial decision. The content of the petition for review, however, concerned the validity of the

³ In its response, OPM contends that it is fundamentally unfair to effectuate the appellant’s survivor annuity election without first determining whether he was competent to represent himself before the Board in his initial appeal. PFR File, Tab 10 at 4. OPM further argues that the initial appeal should be remanded to the administrative judge to determine whether Ms. Magelitz’s participation in the initial appeal constituted an *ultra vires* representation of the appellant and whether Ms. Magelitz concealed the appellant’s mental condition during her participation in the proceedings below. *Id.* at 5-6. However, as we explain elsewhere in this decision, the record does not contain sufficient evidence of the appellant’s mental incompetency at the time that he prosecuted his *initial* appeal to warrant reopening that decision. We further note in this regard that the question of the appellant’s mental competency to elect a former spouse survivor annuity on May 24, 2011, is not properly before us at this time. Neither OPM nor Ms. Deursch has presented sufficient reason otherwise for the Board to reopen the holding in the initial appeal that OPM failed to prove that it sent the appellant the required notice regarding the need to make a new election of a survivor annuity benefit for Ms. Magelitz. *ID* at 7-10.

appellant's election of a former spouse survivor annuity, which resulted from the Board's reversal of the OPM reconsideration decision in MSPB Docket No. PH-0831-10-0626-I-1. The initial decision in that appeal became final on February 8, 2011. IAF, Tab 17 at 10. Thus, there was also a question of the timeliness of the petition for review. Finally, Ms. Deursch's allegations and documents, without further information, were insufficient to warrant granting the petition for review or reopening the appeal.

¶8 Consequently, the Clerk of the Board issued a show cause order directing the parties and Ms. Deursch to submit argument and evidence on all of these matters. PFR File, Tab 14. Ms. Deursch requested additional time to submit medical evidence regarding the appellant's dementia and alleged incompetence, PFR File, Tab 19 at 2, and the Clerk of the Board granted the extension of time and offered all of the parties and Ms. Deursch an additional opportunity to respond to the issues in the show cause order, PFR File, Tabs 20-25. After fully considering all of the submissions, we dismiss the petition for review and deny the request to reopen.

ANALYSIS

¶9 Despite notice and multiple opportunities to cure the deficiency of the petition for review, Ms. Deursch and her attorney failed to enter a proper designation of representative. In her first submission to the Board, Ms. Deursch attached a Durable Power of Attorney form, signed by the appellant and dated June 2, 2008, authorizing her to act as the appellant's agent with respect to his property and health-related matters. PFR File, Tab 1 at 4-8. After receiving notice from the Clerk of the Board that the record on review did not contain an official designation of representative, PFR File, Tab 2, the attorney for Ms. Deursch submitted a designation of representative form that was not signed by the appellant or Ms. Deursch, PFR File, Tab 3. Because the petition for review was not signed by either the appellant or a properly designated representative, it is

deficient under the Board's regulations. *See Schaberg v. U.S. Postal Service*, [104 M.S.P.R. 621](#), ¶ 6 (2007); [5 C.F.R. § 1201.31](#)(a); *see also Livingston v. Office of Personnel Management*, [105 M.S.P.R. 314](#), ¶ 16 (2007); *Smith v. Office of Personnel Management*, [61 M.S.P.R. 512](#), 513-14 (1994). In addition to the original notice issued by the Clerk, PFR File, Tab 2, the Board's show cause order and extension of time order both notified Ms. Deursch of this deficiency, PFR File, Tab 14 at 2-4, Tab 20 at 1-2. Nonetheless, other than arguing that she was attempting to be appointed Guardian and Conservator for the appellant "due to his incompetency" and that the power of attorney "is at least an indication that Mrs. Deursch was acting on [the appellant's] behalf," Ms. Deursch did not submit a designation of representative form signed by either her or the appellant. PFR File, Tab 22 at 2-3. Indeed, the record on review is completely devoid of the signatures of both the appellant and Ms. Deursch; thus, we dismiss the petition for review as deficient under the Board's regulations.⁴

¶10 Furthermore, Ms. Deursch failed to submit sufficient argument or evidence to warrant reopening the appeal. In deciding whether to reopen a closed appeal, the Board will balance the desirability of finality against the public interest in reaching the correct result. *McNeel v. Office of Personnel Management*, [113 M.S.P.R. 356](#), ¶ 17 (2010). The Board will exercise its discretion to reopen only in unusual or extraordinary circumstances, such as the discovery of misrepresentation or fraud after the issuance of the initial decision. *Id.* Although Ms. Deursch alleged fraud and misrepresentation based upon the appellant's incompetency, we find this allegation insufficient under the circumstances of this appeal for the reasons discussed below.

⁴ Because we dismiss the petition for review, we do not reach the timeliness issue. *See Pacilli v. Department of Veterans Affairs*, [113 M.S.P.R. 526](#), ¶ 12, *aff'd*, 404 F. App'x 466 (Fed. Cir. 2010).

¶11 As noted above, OPM argued that the Board should remand the case for a determination of whether the appellant was capable of representing himself below. PFR File, Tab 6 at 4. We find, however, that Ms. Deursch did not successfully challenge the presumption of competency. *See Stubblefield v. Office of Personnel Management*, [60 M.S.P.R. 455](#), 459 (1994); *Dombeck v. Office of Personnel Management*, [43 M.S.P.R. 43](#), 46 (1989). The relevant standard for mental incompetence is “an inability to handle one’s personal affairs because of either physical or mental disease or injury.” *Rapp v. Office of Personnel Management*, [483 F.3d 1339](#), 1341 (Fed. Cir. 2007). In cases related to retirement annuity elections, the Board has held that the party seeking to change the annuity agreement of record bears the burden of showing that the annuitant lacked the requisite capacity to make a valid election. *Stubblefield*, 60 M.S.P.R. at 459; *Dombeck*, 43 M.S.P.R. at 46. In this case, any medical records submitted by Ms. Deursch must be sufficient to call into doubt the appellant’s mental competency to prosecute his appeal pro se. *See Frank v. Office of Personnel Management*, [111 M.S.P.R. 206](#), ¶ 12 (2009).

¶12 Ms. Deursch’s documents do not call into doubt the appellant’s mental competency to prosecute his appeal pro se. There is no evidence or specific allegation concerning the appellant’s inability to manage his personal affairs during the initial appeal proceedings. *See Dombeck*, 43 M.S.P.R. at 46-47; *cf. Rapp v. Office of Personnel Management*, [108 M.S.P.R. 674](#), ¶ 20 (2008). According to the record, the first diagnosis of the appellant’s condition occurred in August 2009, after the appellant began communicating with OPM about providing Ms. Magelitz with a former spouse survivor annuity. PFR File, Tab 1 at 3; IAF, Tab 5, Subtab 5 at 26. The June 6, 2011 document from Mountain View Primary Care stated:

Mr. Magelitz was diagnosed with dementia at an office visit, August 28, 2009. He was placed on medication to begin addressing this problem. He was referred to Dr. Sarim Mir for a neurology

evaluation on September 8, 2009. Dr. Mir also concluded probable mild dementia of the Alzheimer's type.

PFR File, Tab 1 at 3.

¶13 Ms. Deursch also submitted a report dated September 19, 2011, which stated that the appellant was diagnosed with early Alzheimer's dementia. PFR File, Tab 18 at 3. With respect to "past psychiatric history," the report indicated "[m]ild cognitive impairment in 2009." *Id.* at 2. The report did not describe the appellant's ability to manage his own affairs in the period of time prior to filing his initial appeal or during the initial appeal proceedings. Finally, Ms. Deursch submitted a report from Dr. Janice Herron, dated January 31, 2012, which further elaborated on the appellant's current condition. IAF, Tab 22 at 7-10. With respect to her interview with the appellant and his daughter, Dr. Herron noted:

Changes in his functioning have been apparent to family for the past several years. His daughter noted that it is an effort to get him out of the house.

. . . Assistance has been required with the checkbook and bill paying for the past several years. He was recently taken advantage of financially by his ex-wife. . . . Initiation of activities is poor.

PFR File, Tab 22 at 7. Nonetheless, this information does not indicate that the appellant was incompetent to represent himself during the initial appeal period from September through December of 2010. Further, this document was created after Ms. Deursch filed the petition for review and participated in the medical examination, and Dr. Herron's notes were based in part on the information that Ms. Deursch provided. Although Ms. Deursch argued that she has filed a petition to be appointed Guardian and Conservator for the appellant "due to his incompetency," PFR File, Tab 22 at 2, this allegation does not shed light on the appellant's competency or ability to represent himself during the initial appeal.

¶14 Additionally, the record reflects that the appellant contacted OPM in a timely manner after learning of the deposit from OPM in February 2009. IAF, Tab 5, Subtab 5 at 22, 26. The record also reflects that, on May 20, 2009, the appellant obtained an addendum to the divorce decree in an attempt to provide

Ms. Magelitz with a former spouse survivor annuity. *Id.* at 1-2. These actions preceded the appellant's diagnosis on August 28, 2009. The record also reflects that the appellant continued to act consistently by appealing to OPM in October 2009, filing a reconsideration request in January 2010, and filing a Board appeal in September 2010. *Id.* at 24-25; IAF, Tab 5, Subtab 3; IAF, Tab 1. The appellant represented himself during the initial Board appeal proceedings, including during a close-of-record conference with the administrative judge. IAF, Tab 9 at 1. Thus, according to the record before us, it appears that the appellant ably represented himself during the initial appeal. The documents that the appellant filed with OPM and with the administrative judge during the initial appeal are clear, lucid, and signed by him. In the absence of any evidence tending to demonstrate otherwise, his competency has not been sufficiently challenged so as to disturb the initial decision or warrant remand to the administrative judge. Finally, Ms. Deursch's arguments centered on the appellant's ability to make a valid election in May 2011; she did not challenge his competency during the initial appeal proceedings. PFR File, Tab 1 at 1-2, Tab 8 at 3, Tab 11 at 2. Thus, Ms. Deursch did not successfully challenge the presumption of competency, and, in the absence of sufficient doubt regarding the appellant's ability to represent himself below, we decline to reopen the appeal.

¶15 OPM asserted that there is a question of whether the appellant was competent to make a valid election to provide Ms. Magelitz with a former spouse survivor annuity on May 24, 2011. PFR File, Tab 6 at 4-5, 9, Tab 15 at 4. Ms. Deursch also stated that "the issue here is the competence of Mr. Magelitz on the day he executed the 'Election' form in May of 2011, not his 'intentions' at some point in time prior to the execution of the form." PFR File, Tab 8 at 3. This issue, however, is not properly before the Board at this time. The Board generally has jurisdiction over a determination on the merits of a matter affecting the rights or interests of an individual under the Civil Service Retirement System only after OPM has issued a final decision, and the scope of the appeal involving

federal retirement benefits is limited to those matters addressed in OPM's final decision. *Hasanadka v. Office of Personnel Management*, [116 M.S.P.R. 636](#), ¶ 19 (2011); see [5 U.S.C. § 8347](#)(d)(1); [5 C.F.R. § 831.110](#). OPM has not made a final decision on the validity of the appellant's May 2011 election of a former spouse survivor annuity. Thus, any question regarding the validity of that election must be resolved by OPM in the first instance. See *Stubblefield*, 60 M.S.P.R. at 460; see also *Deese v. Office of Personnel Management*, [116 M.S.P.R. 166](#), ¶¶ 9-11 (2011). After OPM makes a final decision, any individual whose rights or interests are affected may appeal the decision to the Board at that time in accordance with the Board's regulations. See [5 U.S.C. § 8347](#)(d)(1); [5 C.F.R. §§ 831.110](#), 1201.3(a)(6).

ORDER

¶16 This is the final decision of the Merit Systems Protection Board concerning the deficiency of the petition for review. The request to reopen the January 4, 2011 initial decision is denied. The January 4, 2011 initial decision will remain the final decision of the Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.